IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY
TO PLAINTIFFS' RESPONSE (DKT. NO. 2176) TO DEFENDANTS' JOINT MOTION TO EXCLUDE THE TESTIMONY OF DR. C. ROBERT TAYLOR (DKT. NO. 2078)

Plaintiffs' response to Defendants' motion to exclude Dr. Taylor's testimony succeeds in making at least one thing clear: In addition to lacking foundation and appropriate methodology, Dr. Taylor's opinions are, for the most part, irrelevant. In fact, it is clearer now that Plaintiffs want to use Dr. Taylor to insert a panoply of issues into the trial that has nothing to do with the elements of any of the causes of action pled. This Court should rebuff Plaintiffs' attempt to layer sociological and economic issues on top of the facts pertinent to their claims.

DISCUSSION

I. The Court serves an important gatekeeping function in evaluating Dr. Taylor's proposed testimony.

Plaintiffs contend that Dr. Taylor, as an economist, does not need to meet the *Daubert* standards for admissibility of his opinions. (Resp. at 4-5: Dkt. No. 2176.) Elsewhere, however, Plaintiffs correctly contend that courts must use the *Daubert* test for all experts: "The Supreme Court held in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that the gatekeeping function set out in *Daubert* applies not only to expert testimony based on scientific knowledge, but also expert testimony based upon technical or other specialized knowledge (i.e. it applies to all expert testimony)." (Pls.' Mot. at 10 n.6: Dkt. No. 2242.) The *Daubert* factors "are applicable to all expert testimony," and are applied as relevant to non-scientific experts. *United States v. Austin Co.*, 2005 WL 6000505, *1 (W.D. Okla. Sept. 29, 2005); *see also United States v. Fredette*, 315 F.3d 1235, 1239-40 (10th Cir. 2003) (applying *Daubert* factors to non-scientific expert).

Although Dr. Taylor's opinions may not be purely scientific in the sense that he did not do Newtonian experiments, he is an economist who must demonstrate that his opinions are reliable by the standards of that field. Plaintiffs compare Dr. Taylor's opinions to a beekeeper who can testify about bees based on his personal experience. (Resp. at 5: Dkt. No. 2176.) But Dr. Taylor's opinions do not rely on his personal experience. He is not a producer or integrator,

for example, so he cannot testify about their relationship based on his experience. Nor is Dr. Taylor like the insurance industry expert who testified in *Milburn v. Life Investors Ins. Co.*, who had spent 30 years working in the industry and testified about the reasonableness of an insurance company's actions. *See* 2008 WL 3539260, *2 (W.D. Okla. Jan. 19, 2008).

This Court must consider "whether the reasoning or methodology underlying [Taylor's] testimony is ... valid and ... whether that reasoning or methodology can be applied to the facts in issue." *Id.* (quoting *Daubert*, 509 U.S. at 592-93.) That means considering whether Dr. Taylor's opinions are based on reliable methodology ordinarily used by economists. The Court should exclude any testimony that relies solely on his "assurance that the methodology and supporting data is reliable" without a description of his methodology and a demonstration that the evidence supports his conclusion. *Mitchell v. Gencorp., Inc.*, 165 F.3d 778, 781 (10th Cir. 1999.) Moreover, the focus is on the evidence, not on Dr. Taylor himself. Whether or not Dr. Taylor is a competent economist, the Court should admit only testimony that is "genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* at 783.

II. Dr. Taylor's opinion on market power not only lacks any recognized methodology, but also is irrelevant.

Despite the professor's repeated references in his report to the integrators' use of their "monopsony power" to control how poultry litter is handled in the IRW, Plaintiffs' response seems to indicate that such references have nothing to do with the rest of his report. See, for example, its protestations, littered throughout pages 10 and 11 of its response brief, that Dr. Taylor's monopsony opinion is "separate" from his other opinions. (Dkt. No. 2176.)

But his other claims – that the growers' profits are too low, that the integrators wrongfully enforce uniform contracts, and that the integrator's contracts are "take-it-or-leave-it" – are not "separate" from his argument about monopsony. They are part and parcel of it.

And if they are not, they are entirely irrelevant. Plaintiffs offer no reason why Dr. Taylor should be permitted to testify generally about the "relationship between growers and integrators." Plaintiffs present him as an economic expert; he should testify about economics.

Plaintiffs accuse Defendants of attacking a straw man in their argument that "[a]ccording to Dr. Taylor, the Defendants accomplish this control with their monopsony power." (*Id.* at 7.) But that is Dr. Taylor's own description of his opinion: in his report he explicitly states that he connects the integrators' alleged monopsony power with the growers' litter-handling practices:

> Even though there are several integrators in the IRW, defendant integrators maintain monopsony or oligopsony power over their contract growers, *extending to waste and dead bird disposal.* [emphasis added]

(Dkt. No. 2091-6 ¶ 22.) In other words, in Dr. Taylor's view:

Power to reduce price paid to growers = Control over how litter is handled

For reasons discussed in the motion to exclude, Dr. Taylor has no foundation for the left-hand side of the equation. But in their response, Plaintiffs seem to disclaim any attempt to prove the equation altogether. If that is Plaintiffs' position, Dr. Taylor's opinion is irrelevant, because he does not explain any connection between integrators and litter, which is the issue in this case.

Plaintiffs excoriate Defendants for "putting into quotes text that was never written or spoken by Dr. Taylor ...." (Resp. at 13: Dkt. No. 2176.) The object of their criticism is this argument: "Dr. Taylor's biggest leap of faith is the leap from 'growers don't make as much money as I think they should' to 'integrators force the growers to dispose of litter illegally.'" (*Id.* at n.7.) But the Plaintiffs have repeatedly engaged in the same usage by referring to contracts as "take-it-or-leave-it," which no one would take as an assertion that the contracts actually contain the words "take it or leave it." *See* Merriam-Webster's Manual for Writers and Editors (Merriam-Webster, Incorporated, Springfield, MA, 1998) at 29.

Plaintiffs also argue that "Defendants' characterization of Dr. Taylor's opinion as being

that integrators control the location of growers' real estate is *bizarre*." (Resp. at 11, n.5: Dkt. No. 2176, emphasis added.) But it is not bizarre. In fact, Defendants' motion tracks closely Dr. Taylor's own words. Dr. Taylor's report paragraph 49 reads, in its entirety:

> In summary, defendants' [*sic*] fully control who will be a grower, who will be responsible for disposal of waste and dead birds, and all contract terms. *Defendants'* [*sic*] *also fully determine the location of poultry waste generation in the IRW*, as well as how much waste is generated in the IRW.

(Dkt. No. 2091-6 ¶ 49, emphasis added.)

In short, Plaintiffs insist that Dr. Taylor's opinions will "assist" the jury, even though they admit his "expertise and opinions are not the type of knowledge that can be replicated and tested in a laboratory." (Resp. at 14: Dkt. No. 2176.) The problem is that Dr. Taylor has substituted theory, guesswork, and politics for acceptable methodology. He asks growers whether they think they are making enough money, rather than finding and quoting data. He opines that poultry litter has no value, rather than finding out what it is selling for in the many actual transactions that are known to exist. He argues that contracts requiring growers to take responsibility for poultry litter in fact require—require!—growers to create environmental harm.

The problem is not lack of a laboratory. The problem is that Dr. Taylor does not use the tools of his trade to form his opinions, and his resulting opinions are theories that are conclusively disproved in the laboratory of the real world. "In theory, there is no difference between theory and practice. But in practice, there is."[1]

III. Plaintiffs offer no valid basis for Dr. Taylor's opinions as to what Defendants knew, nor do Plaintiffs explain how such testimony would help the jury decide any relevant issue.

Dr. Taylor next opines that, based on government publications and academic discourse, Defendants must have known about "environmental concern" from runoff of phosphorus

[1] The quotation, in various forms, is attributed to Lawrence Peter (Yogi) Berra.

compounds. (Taylor R. ¶ 61: Dkt. No. 2091-6.)

Plaintiffs contend that this opinion will be helpful to the jury. But they do not identify any particular element of any of their claims to which this opinion is relevant. This should not be surprising, however, because Plaintiffs did not hire Dr. Taylor to opine about Defendants' knowledge. That is plainly not his area of expertise. Rather, Plaintiffs hired him as an agricultural economist to give opinions about two matters in that field: (1) the relationship between poultry growers and Defendant poultry companies and (2) the economics of the poultry industry, including removal of poultry litter from the IRW. (*Id.* ¶ 6.)

But if Dr. Taylor is not testifying about what he was hired to do, and if Plaintiffs cannot point to any element of their claims that this opinion purports to support, then why is he offering this opinion at all? The answer is obvious: Plaintiffs want Dr. Taylor to present a one-sided history of academic debate to prejudice the jury against Defendants.

Dr. Taylor should be allowed to testify only about matters within his area of expertise, relevant to Plaintiffs' claims, and that are based on solid methodology. Because his opinion of Defendant's knowledge do not meet that test, the Court should bar his testimony about that opinion and the underlying bibliography.

A. Dr. Taylor's opinion about the integrators' knowledge is based on plainly understood facts, and is not appropriate for expert testimony.

Dr. Taylor's opinion about integrators' knowledge is based on the existence of a set of publications. Any jury can understand that reasoning without an expert's help. "When the normal experiences and qualifications of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper." *Hayes v. Wal-Mart Stores, Inc.*, 294 F. Supp. 2d 1249, 1251 (E.D. Okla. 2003).

Plaintiffs respond that the literature in question is complicated and outside the

understanding of the typical layperson. (Resp. at 15: Dkt. No. 2176.) But Dr. Taylor does not provide an explanation of these publications' content to aid the jury. His bibliography of academic articles in paragraphs 62 and 63 does not analyze the cited articles, but only lists their general topics. He does not explain what any particular article found or the overall development of academic research about excess nutrient pollution. In fact, it appears that some of the articles are not about environmental concerns at all, but are only analyses of agricultural economics. (*See* Taylor R. ¶ 63i (examination of "third-party enterprise for moving large quantities of poultry waste"), ¶ 63m ("trading poultry litter in West Virginia"), ¶ 63x "poultry litter use and transportation on Marlyland's [*sic*] eastern shore") (Dkt. No. 2091-6).) In short, Dr. Taylor will not help the jury "navigate this volume of specialized literature" toward any relevant points. (Resp. at 15: Dkt. No. 2176.)

Nevertheless, based on his cursory summary, he offers an opinion about what integrators knew and when they knew it. (Taylor R. ¶ 61: Dkt: No. 2091-6.) The question of whether integrators were aware of these publications or their contents should be reserved for the jury. There is nothing complicated about this inference, and Plaintiffs can question Defendants' witnesses directly about it or introduce documents as evidence, if appropriate. Dr. Taylor's opinion on this question is not necessary and should be excluded.

B. Dr. Taylor's opinion about the integrators' knowledge is speculative.

Even if the integrators' knowledge were an appropriate subject for expert testimony, the Court should exclude Dr. Taylor's opinion as speculative and without foundation. In response to this argument, Plaintiffs merely claim that Dr. Taylor's opinion is not speculative because he cites many sources. (Resp. at 16: Dkt. No. 2176.)

Plaintiffs' argument, however, misses the point. None of the publications cited by Dr.

Taylor addresses what integrators knew or when they knew it. Experts may rely on articles, but only with "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *See Palmer v. Asarco, Inc.*, 510 F. Supp. 2d 519, 526 (N.D. Okla. 2007).

Instead of using the literature to reach an economic opinion, Dr. Taylor draws an unsubstantiated inference about integrators' knowledge based on the simple existence of these largely academic publications. Courts exclude expert testimony that is based on "mere suppositions" or "unsupported conjectures." *See Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (expert testimony based on "a host of unsupported conjectures that falls far short of a methodology" was properly excluded); *Fredette*, 315 F.3d at 1240 (expert must explain how experience and facts lead to conclusion). Dr. Taylor himself admits that he does "not have any direct evidence that the integrators were aware" of the environmental concern. (Taylor Dep. No. 2 at 67: Dkt. No. 2078-3.)

In addition, Plaintiffs do not respond to Defendants' argument that Dr. Taylor does not have the expertise to testify about the knowledge of corporations. Plaintiffs suggest only that such arguments are more appropriate for cross-examination than for a challenge to the admissibility of Dr. Taylor's opinion. The Tenth Circuit, however, has held that expert testimony must be excluded if the expert opines outside "the reasonable confines of his subject area." *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001). *See also LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (experts may not offer opinions on subjects with which they have no "familiarity, knowledge or experience"). Dr. Taylor is an economist, not a corporate executive or an expert on corporate knowledge. His training and experience give him no special insight into what integrators knew or when they knew it. Dr. Taylor may be qualified to give expert testimony on a variety of subjects, but how

corporations become aware of facts is not one of them. *See Mitchell*, 165 F.3d at 783.

IV. Dr. Taylor's calculation of the cost of transporting the litter should be excluded.

Plaintiffs' explanations also cannot save Dr. Taylor's opinion regarding the cost of transporting litter from the IRW.

Plaintiffs' claims to the contrary, Dr. Taylor did not cite sources for his information on two key points. In the first instance, Dr. Taylor's purported authority for his opinion of poultry litter's value is "practically all fertilization experiments conducted for well over a century." (Taylor R. at 34 n, 97: Dkt. No. 2091-6.) In the second, Dr. Taylor's authority for the proposition that the most viable alternative use of poultry litter is "extensive economic analysis done by agricultural economists at the University of Arkansas and Oklahoma State University." (*Id.* ¶ 71.) In neither instance, however, does Dr. Taylor cite to any specific evidence. Instead, he simply asserts that other experts have found the results he claims. But an expert is required to identify his sources so that his opinions can be tested: "The expert's assurance that the methodology and supporting data is reliable will not suffice." *Mitchell*, 165 F.3d at 781.

Plaintiffs further contend that Dr. Taylor did not opine that litter has no economic value in the IRW, and that, in any event, that opinion is unrelated to his opinion on the cost of litter transport. But Dr. Taylor made exactly those contentions. First, Dr. Taylor explicitly states that the litter has "zero gross value" and "no gross value." (Taylor R. ¶¶ 68, 70: Dkt. No. 2091-6.) Second, Dr. Taylor relies on that opinion to supply the foundation for his claim that Defendants should have incurred costs to ship the litter out of the area. If the litter has value in the region, Defendants would not have to ship the poultry litter away. And Dr. Taylor's cost calculation assumes that Defendants were required to ship all the poultry litter out of the IRW. He provides no method for determining what percentage of the total litter could remain in the IRW, because

he assumes that it has no value. And he ignores the existing local market for poultry litter, which shows that farmers in the IRW think it does have value. Because the litter has some value, Dr. Taylor's cost opinions, which are based on the assumption that it does not, collapses.

Plaintiffs also contend that Dr. Taylor need not have considered the potential for integrators to pass shipping costs on to consumers. But Dr. Taylor himself testified that integrators would pass on those costs. (Taylor Dep. 1 at 157, 162-63: Dkt. No. 2078-2.) If Defendants were able to pass the costs on to consumers without any loss of market share, then they were not unjustly enriched by avoiding those costs – their profits are exactly the same as they would have been.

Plaintiffs claim it is impossible to calculate how much of the hypothetical increased cost Defendants could have passed along. If that is true, then Dr. Taylor's analysis about unjust enrichment is speculation. And doing that calculation is Dr. Taylor's job. As an agricultural economist he should be able to estimate what costs Defendants would have been able to pass on. In fact, he purported to do so in his first deposition, describing how the increased cost would be spread across the national poultry market. (Taylor Dep. 1 at 216-219: Dkt. No. 2078-2.)

Indeed, in his depositions, Dr. Taylor acknowledged that his cost calculations were incomplete in this and other respects. He testified that a "proper economic accounting" would include examining: (1) the quantity of litter to be transported out of the IRW, (2) external costs, (3) alternative uses of the litter, (4) lower phosphorus diets, and (5) the impact of the State's proposed injunction on poultry grower operations, integrators, and consumers. (Taylor Dep. 1 at 212:10-25, 214:1-7; Taylor Dep. 2 at 144:14-22.) But he did not calculate how much litter should be transported out. (Taylor Dep. 2 at 144:18-20.) He did not calculate external costs. (*Id.* at 145;10-17.) For alternative uses, he merely "sifted through the literature." (*Id.* at 147:15-

20.) He did not consider lower phosphorus diets. (*Id.* at 148:1-17.) He did not examine the impact of an injunction on poultry growing operations, integrators, and consumers. (*Id.* at 150:15-151:2.) This is more than fodder for cross-examination; it is an expert ignoring his own stated methodology for doing a "proper economic accounting." As the gatekeeper for expert testimony, the Court should exclude Dr. Taylor's half-done analysis.

V. The jury will not be assisted by Dr. Taylor's legal analysis of the Packers and Stockyards Act or his personal opinion about what is "responsible."

Plaintiffs appear to be distressed by the brevity of Defendants' arguments to exclude an economist's legal opinions and personal views. But this reply will be similarly brief.

Dr. Taylor's proposed testimony is that the integrators' position "that the PSA prevents them from negotiating with individual growers is pretext, in my opinion." (Taylor R. ¶ 21: Dkt. No. 2091-6.) One can say that is not a legal opinion, but it is. Dr. Taylor is not qualified to tell the jury what is or is not required by the act, and in any case he is trying to usurp the Court's role in instructing the jury. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994). As to the term "responsible," Dr. Taylor is not exempt from compliance with Rules 402 and 702 and *Daubert* because he "is a qualified expert in the field of agricultural economics ...." (*See* Pls.' Resp. at 20.) There is no such rule. The Rules of Evidence apply to him just like anyone else.

CONCLUSION

The overheated rhetoric in Plaintiffs' response cannot cloud what is obvious: Dr. Taylor's testimony would confuse the jury and make trial unnecessarily long and difficult. This Court should find the proposed testimony does not pass muster under Rules 402 and 702 and *Daubert* and its progeny.

Respectfully submitted,

June 19, 2009

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